Supreme Court, U.S.
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No. 09-1254

IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Norton Simon Art Foundation, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Art Foundation.

Respondent Norton Simon Museum of Art at Pasadena, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Museum of Art at Pasadena.

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INTRODUCTION

By enacting California Code of Civil Procedure § 354.3 ("Section 354.3" or "§ 354.3"), the State of California has attempted to provide its own resolution of claims for artwork looted by the Nazis. That provision is part of a programmatic effort by the State to resolve claims arising out of foreign wars, including other World War II-related injuries. The federal and state courts have spoken with one voice in considering challenges to these statutes: each has been struck down on the ground that it impermissibly usurped the federal government's foreign affairs power. The Ninth Circuit's Opinion falls in line with these authorities, holding that "Section 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government." Pet. App. 25a.

Confronted with this uniform precedent, Petitioner does not even contend that certiorari is warranted to resolve a conflict in the lower courts. Instead, Petitioner's lead argument is that the Ninth Circuit erred in its application of *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), because it "misconstru[ed]" the "legislative history" of the California statute. Pet. 11. Yet, this Court's rules make plain that certiorari is not available to review errors in the application of this Court's precedent, let alone errors in the proper interpretation of state law. Sup. Ct. R. 10. Nor does the Petition present an issue of exceptional importance. The parties have identified only one other pending case involving Section 354.3; the statute is set to expire at the end of *this year*; and Petitioner has failed to identify any similar state laws outside California, a point underscored by the absence of amicus briefs by other states supporting the Petition.

Petitioner and her amici insist that the Opinion works an "expansion" of foreign affairs preemption. Pet. 10; Brief of Amici Bet Tzedek Legal Services *et al.* ("Bet Tzedek Br.") 19-27; Brief for the State of California as Amicus Curiae ("Cal. Br.") 5-9. But the Court of Appeals applied settled precedent to invalidate a singularly aggressive intrusion by California into the area of war resolution. The Opinion closely tracks the limited field preemption approach suggested in *Garamendi*. Its result was fairly dictated by the Circuit's decision in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), which applied field preemption to invalidate a sister statute, and which this Court declined to review following *Garamendi*.

This case is also a poor vehicle for considering the "continued validity" of foreign affairs field preemption (Pet. 10). Petitioner's Section 354.3 action would be independently barred under conflict preemption principles. It is undisputed that the United States recovered the subject paintings and returned them to The Netherlands in accordance with the federal government's policy of "external restitution." Under that policy, American forces returned Nazi-looted artworks to their countries of origin, which were then responsible for individual restitution. By allowing Petitioner to second-guess Dutch restitution proceedings, her Section 354.3 action would defeat the purpose of this policy.

STATEMENT

1. Section 354.3 provides that any owner of "Holocaust-era artwork[] may bring an action to recover Holocaust-era artwork" from "any museum or gallery" exhibiting art. § 354.3(b), (a)(1). The California Legislature framed the injury it sought to

remedy in historical terms, defining "Holocaust-era artwork" to mean "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive." *Id.* § (a)(2). The statute permits these claims to be brought even if they would otherwise be time-barred: "Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010." *Id.* § (c).

The California Legislature made clear that Section 354.3's purpose was to aid "[t]housands of victims of Nazi persecution" by redressing the looting suffered during World War II. 2002 Cal. Stat. Ch. 332, § 1(b). Although the statute's legislative findings purport to focus on "residents of the State of California" *ibid.*, the Legislature made a considered decision to extend the statute's reach to plaintiffs and defendants beyond the State's borders. The statute does not limit Holocaust art plaintiffs to California residents or citizens, and exempts them from California's borrowing law for statutes of limitations. *See* § 354.3(b) ("Section 361 does not apply to this section."). In both these respects, the Legislature departed from the claim-reviving statutes it cited as models. *See* Sen. Jud. Comm., Analysis of Assem. Bill 1758 (2001-2002 Reg. Sess.) Jun. 25, 2002, at 4. The Legislature also struck language in the original bill that would have limited the eligible defendants to California museums, Pet. App. 23a (citing Sen. Jud. Comm. Analysis, *supra*), making it applicable to "any museum or gallery" regardless of residence, § 354.3(a)(1).

2. Section 354.3 is just one section in a family of California statutes purporting to revive stale claims arising out of historical wrongs. Section 354.4

establishes a cause of action for insurance claims arising out of the Armenian genocide; Section 354.45, for Armenian genocide claims against banks; Section 354.5, for Holocaust insurance claims; and Section 354.6, for slave labor at the hands of "the Nazi regime, its allies and sympathizers." Another provision, Section 354.7, addresses claims arising out of the federal government's "Bracero" program for migrant laborers. These statutes are patterned on the same basic structure, establishing a new claim for an historical injury,[1] and then stripping the defendant of any otherwise-applicable statute of limitations defense for a fixed term.[2]

California viewed Section 354.3 as part of the State's broad-based effort to provide its own remedies for wartime harms. The Legislature invoked two 354-series statutes as models: the provisions reviving Holocaust insurance claims (Section 354.5), and Armenian Genocide claims (Section 354.4). *See* Assem. Jud. Comm., Rep. on Assem. Bill 1758 (2001-2002 Reg. Sess.), at 2. In recommending that then-Governor Davis sign the legislation into law, the Governor's office stressed that California "has been a leader" in providing redress for Holocaust victims. Pet. App. 24a (citing Enrolled Bill Report on Assem.

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[1] *See* Cal. Civ. Proc. Code § 354.4(b) (authorizing "any Armenian Genocide victim" residing in the state to bring a claim on "an insurance policy or policies" issued "in Europe or Asia between 1875 and 1923"); *id.* § 354.45(b) (similar); *id.* 354.5(b) (similar); *id.* § 354.6(b) (similar).

[2] *See* Cal. Civ. Proc. Code § 354.4(c) (action "shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010"); *id.* § 354.5(c) (same); *id.* § 354.6(c) (same); *id.* § 354.45 (similar; action must be filed "on or before December 31, 2016").

Bill 1758 (2001-2002) Reg. Sess. Aug. 1, 2002).

3. The 354-series statutes and related California laws redressing war injuries have been uniformly invalidated under the foreign affairs doctrine.

In *Deutsch*, the Ninth Circuit struck down Section 354.6, the provision reviving slave labor claims arising out of World War II. 324 F.3d 692. In enacting Section 354.6, the Court reasoned, California had created a "special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies." *Id.* at 708. Applying field preemption principles, the Court held that the statute "intrude[d] on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id* at 712.

While the *Deutsch* plaintiffs' petitions for certiorari were pending, this Court issued its ruling in *Garamendi*, which invalidated another California statute relating to injuries suffered in World War II. *Compare Garamendi*, 539 U.S. 440 (June 23, 2003) *with* Pet. for Cert., *Ma v. Kajima Corp.*, No. 02-1778 (June 4, 2003); Pet. for Cert., *Saldajeno v. Ishihara Sangyo Kaisha Ltd.*, No. 02-1784 (June 4, 2003); Pet. for Cert., *Kim v. Ishikawajima Harima Heavy Indus.*, No. 02-1773 (June 2, 2003); Pet for Cert., *Tenney v. Mitsui & Co.*, No. 02-1775 (June 4, 2003). In their briefs, the *Deutsch* plaintiffs and amici advanced the same grounds for review urged by Petitioner here. They argued that *Deutsch* "present[ed] the Court with the opportunity to complete the foreign affairs analysis it began in *Garamendi*" (Brief of State of Cal. as Amicus Curiae, *Tenney*, *supra*, at 8), because it "raise[d] the very question" about field preemption reserved in that case (Reply Brief, *Tenney*, *supra*; *accord* Reply Brief, *Kim*, *supra*, at 4 ("this Court

should accept review to resolve the question left unanswered in *Garamendi*")). This Court denied each of the petitions. *See* 540 U.S. 820-21 (2003).

In the wake of *Garamendi* and *Deutsch*, the lower state and federal courts have struck down five of the six 354-series statutes: Section 354.4, reviving Armenian genocide claims, *see Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1063 (9th Cir. 2009), *pet. for reh'g en banc pending*; Section 354.45, reviving Armenian genocide bank claims, *see Deirmenjian v. Deutsche Bank AG*, 526 F. Supp. 2d 1068, 1089 (C.D. Cal. 2007); Section 354.5, reviving Holocaust insurance claims, *see Steinberg v. Int'l Comm'n on Holocaust-Era Ins. Claims*, 34 Cal. Rptr. 3d 944, 952-53 (Ct. App. 2005); and Section 354.6, the slave labor provision, *Taiheiyo Cement Corp. v. Superior Court*, 12 Cal. Rptr. 3d 32, 41 (Ct. App. 2004) (concurring with *Deutsch*). The sole surviving 354 statute, Section 354.7, is the one that does *not* address claims for injuries suffered in foreign-war persecution. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005) (upholding claim for federal migrant laborer program).

4. Despite the gathering 354 invalidations, Petitioner brought a Section 354.3 action against the Museum. Pet. App. 8a.

a. Petitioner seeks recovery of *Adam* and *Eve*, a pair of medieval panels by Lucas Cranach the Elder. The Norton Simon foundations acquired the panels in 1970-71, and have continuously displayed them at the Norton Simon Museum of Art at Pasadena since 1979. *Ibid.*; Appellants' Excerpts of Record in CA9 ("ER") 277-78.

b. The underlying ownership dispute over the Cranachs centers on two acts of looting and two

prior restitution proceedings in The Netherlands.

According to Petitioner, the Soviet Union seized the Cranachs from a church in the 1920s. Compl. ¶ 11. The Soviets sold the Cranachs in 1931 as part of an auction titled "the Stroganoff Collection," which featured artworks from the noble Stroganoff house. *Id.* ¶ 13. Over the Stroganoff family's protest, the Cranachs were purchased by Petitioner's predecessor-in-interest, a prominent Dutch art dealer named Jacques Goudstikker. *Ibid.*; *see also Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 20 (S.D.N.Y. 1976).

In 1940, Nazi Germany invaded The Netherlands, and Goudstikker was forced to flee with his family. Pet. App. 9a. The inventory of Goudstikker's gallery, including the Cranachs, were forcibly sold to Hermann Göring, Reichsmarschall of the Third Reich. *Ibid.* The United States Army recovered the Cranachs and other works looted by Göring in Germany at the close of the war. *Ibid.* In 1946, the United States returned the Cranachs and other works from the Goudstikker collection to The Netherlands. *Id* at 9a-10a.

c. It is undisputed that the United States returned the Cranachs to The Netherlands as part of the federal government's "external restitution policy." Pet. App. 19a; Compl. ¶ 22. Under that policy, the United States restituted recovered artworks to their countries of origin, and not to individual owners. Pet. App. 16a (citing Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: The U.S. and Holocaust Victims Assets (2000) ("Plunder & Restitution")). President Truman formally adopted the policy at the Potsdam Conference to deal with looted artworks recovered by

American forces. *Ibid.*

The policy was the outgrowth of the London Declaration of January 5, 1943, by which Allied nations—including the United States and The Netherlands—reserved the right to invalidate wartime transfers of property. Pet. App. 15a. To formulate the United States' policy on looted art, the State Department established an inter-agency committee. Pet. App. 17a; *see also* Plunder & Restitution SR-139. The committee considered individual restitution and other options, but ultimately decided in favor of restitution to the country of origin. Pet. App. 16a. "The question of restoration to individual owners," the committee concluded, "is a matter for these governments to handle in whatever way they see fit." Plunder & Restitution SR-140 (quoting Memo from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Apr. 10, 1944); *accord* Pet. App. 17a. The committee determined that the originating country was best situated to resolve complex issues of individual ownership, and to dispose of the works if no owner could be found. *Ibid.* Upon transferring the works, the United States was to have no further role in the restitution process. *Ibid.*

President Truman formally approved this external restitution policy, as set forth in a statement titled "Art Objects in the U.S. Zone," on July 29, 1945. Pet. App. 16a. American occupying forces implemented the policy under the order of General Dwight D. Eisenhower, Military Governor of the American Occupation Zone. *Id.* at 4. The United States set the deadline for filing claims for April 1948, finding that three years was sufficient time, absent concealment, for countries to file claims. Plunder & Restitution SR-143.

d. Following the war, Goudstikker's widow initiated formal restitution proceedings in The Netherlands. Compl. ¶ 23. Ms. Goudstikker eventually reached a settlement with the Dutch government for certain real and personal property forcibly sold to the Nazis. Supplemental Excerpts of Record in CA9 ("SER") 146. Under protest, however, she chose not to seek the return of the Goudstikker artworks, which would have required her to return the money paid by Göring for those works. SER 151-52. The time to file a claim under Dutch law elapsed in 1951. *Ibid.*

e. A decade after the Goudstikker restitution proceedings were concluded, the Stroganoff heir filed a restitution claim with The Netherlands for the Cranachs and other works. Pet. App. 10a. In 1966, the Dutch government transferred the Cranachs to Stroganoff as part of a settlement that included a monetary payment. *Ibid.*; Compl. ¶ 30. Stroganoff sold the Cranachs to the Norton Simon foundations in 1970-71. *Ibid.*

5. Petitioner became the successor-in-interest to Jacques Goudstikker in 1996. Compl. ¶ 35. In 1998, she filed a new restitution claim with the Dutch government, seeking return of the Goudstikker artworks recovered by the Allies. SER 147, 151-52. Both the government and the Court of Appeals for the Hague denied the claim as time-barred, and rejected Petitioner's challenges to the 1950s restitution proceedings. *Ibid.* In 2004, however, the Dutch government decided to "depart from a purely legal approach" to restitution, later returning 200 paintings to Petitioner on "moral" grounds. ER 60-62.

6. After Petitioner filed suit in this case, the

district court granted the Museum's motion to dismiss. The district court held that the foreign affairs doctrine preempted Section 354.3, and that Petitioner's action was otherwise time-barred. Pet. App. C.

The Ninth Circuit affirmed the preemption holding. The Court first considered and rejected the Museum's conflict preemption challenge. While recognizing that Section 354.3 "would have directly conflicted with the federal government's policy of external restitution" in the post-war period, the Court believed conflict preemption inapplicable because the policy is "no longer in effect." Pet. App. 19a. The Court nonetheless held Section 354.3 unconstitutional because it "infringe[d] on the national government's exclusive foreign affairs powers." *Id.* at 4a. The "documented history of federal action addressing the subject of Nazi-looted art," including external restitution, made the federal government's presence "so comprehensive and pervasive as to leave no room for state legislation." *Id.* at 28a-29a. Nor could California make any "serious claim to be addressing a traditional state responsibility." *Id.* at 24a. By adopting Section 354.3, the Court explained, California intended to create a "world-wide forum for the resolution of Holocaust restitution claims." *Id.* at 25a, 23a.

Judge Pregerson dissented. Pet. App. 36a-38a. Petitioner filed a petition for panel rehearing and/or rehearing en banc. Apart from Judge Pregerson, "[n]o judge requested rehearing en banc." *Id.* at 3a.

REASONS FOR DENYING THE PETITION

The Opinion below is the latest in a line of federal and state decisions striking down nearly identical California statutes on foreign affairs preemption grounds. Like those decisions, the Court of Appeals held that Section 354.3 intruded upon the federal government's foreign relations power by attempting to furnish its own resolution of war claims. The Ninth Circuit arrived at this result by applying the Court's most recent decision on foreign affairs preemption, *Garamendi*, and the Circuit's prior field preemption decision in *Deutsch*, which invalidated a statute on which 354.3 was modeled.

Petitioner identifies no systemic or compelling reason to disrupt the consensus that California has overstepped its constitutional authority. Section 354.3 is set to expire this year. The Petition references only one other pending lawsuit that implicates Section 354.3, and points to no statutes outside of California that would be affected by the Opinion below. The Petition focuses heavily on *Garamendi*, yet identifies no division of authority on that decision warranting intervention.

The questions presented are, moreover, unworthy of review even on their own terms. Petitioner's lead arguments center on whether the Court of Appeals correctly construed Section 354.3 in concluding it (1) did not address a traditional state interest (Pet. 11-20); and (2) constituted an impermissible effort "to rectify[] wartime wrongs" (*id.* at 21 (citation omitted)). Both arguments are intertwined with state-law issues of statutory construction, which cannot support certiorari. These issues were also correctly resolved by the Court of Appeals. The text and legislative history of Section 354.3 demonstrate

that California's purpose was not to "provide[] a statute of limitations" (Pet. 21), but to resolve claims arising out of a foreign war. This is not an area of traditional state responsibility under *Garamendi*.

Despite Petitioner's suggestion, the Opinion below presents no occasion to "settle the question" of a "broad foreign affairs field preemption." Pet. 10. This Court just recently considered "the continued validity" of *Zschernig* (*ibid.*) in *Garamendi*, clarifying the boundaries between the field and conflict variants of foreign affairs preemption. The Opinion follows *Garamendi*'s limited approach to field preemption, and comes nowhere close to testing the boundaries of that doctrine. The result reached by the Ninth Circuit flows directly from the Circuit's decision in *Deutsch*—a case where this Court was presented with, and declined to review, the *very same* field preemption challenge posed here. Even if the Court believed it worthwhile to revisit *Garamendi*'s field preemption framework so soon after the decision, this would still be the wrong case for addressing that issue. Because the Court could readily affirm the judgment on conflict preemption grounds, it would be unlikely even to reach field preemption.

I. The Opinion Decides an Issue that Has No Significance Beyond this Case and Creates No Division of Authority

The ruling below does not warrant review for several reasons wholly independent of the specific issues Petitioner raises. The Court of Appeal's holding is narrow and of limited application. It rests firmly on recent authorities, about which there is neither conflict nor confusion. And the result here fits neatly into a line of cases striking down virtually identical statutes.

1. The Opinion's holding has little, if any, relevance beyond this case. The operative provision of Section 354.3(c), which revives stale claims, is set to expire on *December 31 of this year*. *See* § 354.3(c). Nor is this a situation in which the invalidation of the statute could potentially affect a wide swath of pending litigation. *Cf. United States v. United States Shoe Corp.*, 523 U.S. 360, 365 (1998) (issue presented was raised in more than 4,000 federal cases). The Petition references, and only in passing, just *one* pending Holocaust art case that depends upon Section 354.3. Pet. 26, n.9 (citing *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009)). That is the only other 354.3 claim Respondents have been able to identify, *see Cassirer v. Stephen Hahn*, No. 1158698 (Cal. Super. Ct. July 15, 2005) (order dismissing overlapping state court action), and independent bars may prevent that suit from going forward, *see* 580 F.3d at 1064 (applying exhaustion requirements under the Foreign Sovereign Immunities Act), *reh'g en banc granted*, 590 F.3d 981 (9th Cir. 2009). Nothing suggests there will be a spate of new lawsuits in the next six months.

The concern that the Opinion "may well impede the enactment of similar statutes in other states" (Pet. 20) is entirely hypothetical. Neither Petitioner nor her amici have identified any other state that has sought to resolve claims for Nazi-looted art. The most Petitioner can do is compare Section 354.3 to state tax and education statutes providing benefits to Holocaust victims. Pet. 22-23. Such laws are unaffected by the holding below, since they do not purport to resolve claims or impose liability for war-related injuries. *Post* at 23-24. And the states in other circuits would not be bound by the Opinion below in any event.

2. None of the issues raised by Petitioner is marked by the sort of confusion or conflict that would justify this Court's intervention.

Petitioner does not even contend that the Opinion conflicts with a decision issued by another Court of Appeals. *See* Sup. Ct. R. 10(a). The Petition centers on *Garamendi,* questioning whether the Court of Appeals "misconstrued" that decision or improperly expanded its preemption analysis. Pet. 10, 29. Yet, outside the Ninth Circuit's rulings below and in *Movsesian*, there are only two Court of Appeals opinions applying *Garamendi*'s preemption analysis: *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113 (2d Cir. 2010), and *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). Both decisions invoked *Garamendi* to hold that the foreign affairs doctrine preempted state law claims for war-related injuries. *See Generali*, 592 F.3d at 119-20 (deeming preempted state law claims against Italian insurer for Holocaust-era benefits); *Saleh*, 580 F.3d at 12-13 (holding preempted common law claims against defense contractors for abuse suffered in Iraqi prison). The outcomes in these cases are thus fully consistent with the ruling below.

Petitioner similarly cannot show that the ruling below conflicts "with a decision by a state court of last resort." Sup. Ct. R. 10(a). The only state Supreme Court decision addressing *Garamendi* was the Texas Court of Criminal Appeal's decision in *Medellin*. *See Ex Parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006). That decision already has been reviewed by this Court, *see Medellin v. Texas*, 552 U.S. 491 (2008), and its holding focused on separation of powers concerns rather than the federalism principles that drove *Garamendi*, *id.* at 533.

Only a handful of state intermediate court opinions apply *Garamendi*, and most of those involve challenges to California's 354-series provisions. The California cases are uniform, with the Court of Appeal invalidating each of the statutes reviving claims for injuries suffered in foreign wars. *See Steinberg*, 34 Cal. Rptr. 3d at 952-53; *Taiheiyo*, 12 Cal. Rptr. 3d at 42-46; *Mitsubishi Materials Corp. v. Superior Court*, 6 Cal. Rptr. 3d 159, 162-63 (Ct. App. 2003). These decisions join other federal court decisions that have likewise invalidated California's war-remedies provisions, *see Movsesian*, 578 F.3d at 1063; *Deirmenjian*, 526 F. Supp. 2d at 1089, sparing only the provision that involves a *domestic* labor program, *Cruz*, 387 F. Supp. 2d at 1076.

Were this Court to grant review, then, it would be providing guidance on issues that are significant only in the dispute between the parties and possibly one or two other cases involving looted artwork. That is not a "compelling reason[]" to grant review. Sup. Ct. R. 10.

II. The Court of Appeals Correctly Held that Section 354.3 Does Not Address a Traditional State Interest

The principal issue raised by Petitioner is whether the Court of Appeals erred in holding that California was not acting in an area of traditional state responsibility when it adopted Section 354.3. Pet. i, 11-20. According to Petitioner, the Ninth Circuit "misconstru[ed] *Garamendi* and the legislative history of § 354.3" when it concluded that California had impermissibly attempted "to 'create[] a world-wide forum for the resolution of Holocaust-restitution claims.'" *Id.* at 11 (capitalization and citation omitted).

1. This is a manifestly inadequate ground for review. The Court does not grant certiorari to review issues centering on the proper interpretation of state law. *See Thomas v. American Home Prods.*, 519 U.S. 913, 916 (1996) ("[T]his Court's function, generally speaking, is not to correct federal courts' misapplications of state law[.]"). Whether California's enactment of Section 354.3 exceeds its "traditional competence" under *Garamendi* turns on the scope and purpose of that statute. That is why Petitioner devotes an entire section of the Petition (Pet. 16-20) to challenging the Opinion's construction of Section 354.3. She asks the Court to review whether the Court of Appeals "divine[d] a legislative intent belied by the legislative record" (*id.* at 9), and thus "mischaracterized" its purpose (*id.* at 11). But when a federal issue is intertwined with a state-law construction issue, the Court ordinarily "defer[s] to the construction of a statute given it by the lower federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985).

2. Even apart from this fundamental defect, the Court of Appeals' construction and analysis of Section 354.3 is unworthy of review. The Opinion below applies, in straightforward fashion, *Garamendi*'s assessment of one California Holocaust statute to another statute aimed even more directly at furnishing a remedy for Holocaust-related injuries.

a. *Garamendi* involved a California disclosure law related to Section 354.5, the statute reviving Holocaust insurance claims. The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA") required insurers doing business in California to disclose information about Holocaust-era policies. 539 U.S. at 409. The "HVIRA was meant to enhance enforcement of [Section 354.5]," and both provisions

were enacted as part of the same bill. *Id.* at 410; *see also id.* at 423. This Court held that the statute conflicted with the federal government's policy on Holocaust insurance claims. *Id.* at 425-26. The Executive branch, the Court explained, had entered into agreements with Germany and other countries to resolve Holocaust insurance claims through a voluntary fund. *Id.* at 421-22. By "providing regulatory sanctions to compel disclosure," California took a "different tack" from the federal government. *Ibid.*

While deciding the case on conflict preemption principles, the Court recognized "the contrasting theories of field and conflict preemption evident in [its prior decision] in *Zschernig* [*v. Miller*, 389 U.S. 429 (1968)]." 539 U.S. at 419. In *Zschernig*, this Court held preempted an Oregon probate statute that invited judicial criticism of communist regimes. 389 U.S. at 432. The statute, the majority reasoned, constituted an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Ibid.* Justice Harlan, writing separately, suggested that foreign affairs preemption be limited to cases involving "conflicting federal policy." *Id.* at 458-59 (concurring opinion). The *Garamendi* Court proposed treating field and conflict preemption as "complementary," with field preemption applying when the state has "no serious claim to be addressing a traditional state responsibility," and conflict preemption applying, along a sliding scale, when it acts within its "'traditional competence.'" 539 U.S. at 419 (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring")).

After analyzing the conflict between HVIRA and federal policy, the Court went on to note "the weakness of the State's interest, against the backdrop

of traditional state subject matter." *Id.* at 425. California had argued that HVIRA was intended to advance a "legitimate consumer protection interest" in the treatment of Holocaust insurance claims. *Id.* at 426. The Court rejected that interest, concluding that HVIRA was actually grounded in "concern for the several thousand Holocaust survivors said to be living in the state." *Ibid.*

b. Petitioner insists that *Garamendi* deemed California's interest in HVIRA weak because the State was "imposing its insurance regulations" upon companies and transactions "having no connection with the state." Pet. 14-15. But *Garamendi* expressed no concerns about extraterritoriality, and for good reason: the HVIRA applied to insurance companies *doing business* in the State of California. Indeed, the "iron fist" wielded by California was the "mandatory penalty" of "suspension of the company's license to do business in the State." 539 U.S. at 410. The weakness of California's interest flowed not from extraterritoriality, but from the State's effort to reach beyond "traditional state legislative subject matter," by focusing on Holocaust-related insurance claims. *Id.* at 425.

c. In the same vein, Petitioner suggests that the Court of Appeals found California's interest in Section 354.3 weak only because the Legislature "did not limit the scope of § 354.3 to museums and galleries physically located in California." Pet. 15, 2. The point is irrelevant and wrong. It is irrelevant because *Garamendi* struck down the HVIRA notwithstanding its express limitation to insurance companies operating in California and "Holocaust survivors resid[ing] in California." 539 U.S. at 425.

The point is wrong because Petitioner fundamentally misreads the Opinion below. The Ninth Circuit found that California lacked a traditional legislative interest because it sought to create its own war remedy, "express[ing] its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." Pet. App. 24a. The Court cited the State's decision to reach beyond California museums not because that extraterritorial reach itself rendered the statute unconstitutional, but as *evidence* that the State had improperly legislated a scheme for resolving war-related claims. "The scope of the statute," the Court explained, "belies California's purported interest in protecting its residents and regulating its art trade." *Id.* at 23a. That reasoning tracks precisely *Garamendi*'s reasoning that California's focus on Holocaust victims "raise[d] great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring." 539 U.S. at 426.

The Court of Appeals was assuredly right on this score. Viewed against other 354-series statutes, Section 354.3 reflects a considered judgment by California to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the State." Pet. App. 23a. As the Opinion notes (*ibid.*), the California Legislature struck language in the original bill that would have limited eligible defendants to California museums. With respect to plaintiffs, Section 354.3 departs from other 354-series statutes in two ways: (1) it does not limit eligible plaintiffs to California residents; and (2) it exempts Holocaust art claimants from California's borrowing law for statutes of limitations. *Compare*,

e.g., Cal. Civ. Proc. Code § 354.4. The Legislature understood and intended both of these expansions. ER 114-15.

That California sought to subject out-of-state museums to suit within Due Process limitations (Pet. 17-18) cannot legitimate the State's aggrandizing purpose. Due Process is an independent bar; California's decision to abide by it does not prove the State is legislating in a traditional area. To the contrary, the Legislature drew up Section 354.3 with the express goal of "provid[ing] a venue to victims of Nazi persecution elsewhere in the country whose states have not authorized such suits." ER 114. That goal fits hand-in-glove with California's effort to establish its own resolution of World War II claims.

3. California's incursion into the field of war remedies is hardly saved because it chose to revive stale claims and "extend the time in which claims for stolen property can be asserted." Pet. 19. Even accepting that "establishment of a statute of limitations" is "a traditional state responsibility," a claim-reviving statute that "effectively singles out only [artworks looted by Nazi Germany] at least 55 years ago" is not. *Cf. Garamendi*, 539 U.S. at 426. What is more, Petitioner is wrong to suggest that Section 354.3 merely extends the limitations period, or that reviving decades-old claims is even something within a state's "traditional competence," *id.* at 419. n.11. Section 354.3 "creates a new cause of action," thereby reviving potential liability and retroactively negating time bars. Pet. App. 26a. The statute is therefore "substantive in nature," and not "merely procedural." *Deutsch*, 324 F.3d at 707-08. Indeed, as the Ninth Circuit observed in *Deutsch*, California's novel claim-reviving approach "raise[s] serious due process questions." *Id.*

III. The Court of Appeals Properly Treated Section 354.3 as an Effort by California to Provide Its Own Resolution of War Claims

Petitioner argues that the Court of Appeals erred in holding that "§ 354.3 is unconstitutional because it was enacted 'with the aim of rectifying wartime wrongs committed by our enemies.'" Pet. 21. This argument takes as given "the foreign affairs field preemption doctrine" addressed in *Garamendi*, and challenges only the Court of Appeals' conclusion that Section 354.3 contravenes that doctrine. *Ibid.*

1. Like her first issue, Petitioner's challenge to the Court of Appeals' field preemption analysis turns on a state-law issue of statutory construction. Her main point is that "the majority *interpreted § 354.3 too broadly*" by treating the statute as a war-remedy provision. Pet. 21 (emphasis added). But again, "this Court normally follows lower federal-court interpretations of state law," *Steinberg v. Carhart*, 530 U.S. 914, 940 (2000), and the Ninth Circuit expressly held that "Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during World War II," Pet. App. 28a.

2. Even if it were appropriate to take up the Petition's state-law statutory construction issues, the Court of Appeals correctly held that Section 354.3 usurps the National Government's "exclusive power to make and resolve war." Pet. App. 26a.

Invoking Judge Pregerson's dissent, Petitioner emphasizes that Section 354.3 "does not target enemies of the United States." Pet. 21. The State's amicus brief makes the same argument. Cal. Br. 10. But *Garamendi* itself held that a statute may violate the foreign affairs doctrine even if it regulates private parties. 539 U.S. at 416 ("wartime claims against

even nominally private entities have become issues in international diplomacy"). The key point, instead, is that Section 354.3 legislates a scheme for resolving claims arising from war, "a power reserved exclusively to the federal government." *Id.* at 25a.

The Court of Appeals properly treated Section 354.3 as a war-remedy statute because its whole purpose is to provide redress for "the victims of Nazi persecution." Ch. 332, § 1(b). The "actionable injury at the heart of the statute is the Nazi theft of art." Pet. App. 26a. The statute is limited to claims for "Holocaust-era artwork," § 354.3(b), and defines that term to mean works "taken as a result of Nazi persecution," *id.* § (a)(1). California's decision to target museums currently possessing looted artworks, and not "enemies of the United States," (Pet. App. 37a (Pregerson, J., dissenting)), in no way alters its war-related purpose. In allowing claims against current possessors, California merely recognized that the wrongs it seeks to rectify occurred during a war that ended 65 years ago. *Id.* at 26a-27a.

On this point, Judge Pregerson's comparison to the 354-series provision invalidated in *Deutsch* (*ibid.*) serves to underscore, rather than undercut, the inference that Section 354.3 aims to redress wartime injuries. That statute permitted lawsuits against "any entity *or successor in interest* thereof, for whom [slave] labor was performed," § 354.6(b) (emphasis added), and the *Deutsch* defendants included American affiliates of foreign corporations, 324 F.3d at 712. Even though it was clear that Section 354.6 applied to parties who were not "enemies of the United States," the *Deutsch* Court did not hesitate to hold the statute preempted.

3. Given that California enacted Section 354.3 for

the purpose of resolving war-related claims, the Court of Appeals was plainly correct in holding that its intrusion on foreign relations was not "purely incidental." Pet. 28.

Although Petitioner repeatedly suggests that the statute somehow operates as a law of general application (Pet. 21-22, 28), the "verboten intent" reflected in the statute's text and legislative history forecloses such treatment (Pet. App. 27a). Section 354.3 is not "completely neutral in its application" (Pet. 28), but depends on the existence of an injury suffered in a foreign war. As noted, the statute does not "merely provide[] a statute of limitations" (*id.* at 21), but creates a new claim to redress specified war injuries. In adopting this remedy, the Legislature not only inserted itself into the field of war resolution, but did so in a direct and aggressive manner, extending its war remedy to out-of-state and even international plaintiffs and defendants.

Because it strikes down a statute that purposefully involves the State in foreign affairs, the Opinion carries no implications for common law claims or other laws of general application.[3] Petitioner and her amici direly predict that the Opinion below threatens "any state statute that provides relief to Holocaust

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[3] Petitioner's reliance on *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), is misplaced. The court there had before it only common law claims, and bracketed the validity of the 354-series statute invoked by the plaintiffs (354.6). *Id.* at 541 n.4, 543. The Ninth Circuit's analysis rested not on the foreign affairs doctrine, but on the political question doctrine and its underlying separation of powers concerns. *Id.* at 561. Even if the Opinion and *Alperin* "cannot be reconciled" (Pet. 22), Petitioner nowhere explains why this purported *intra*-Circuit conflict would justify review.

victims." Pet. 23; Bet Tzedek Br. 23-27. But the virtually identical holding in *Deutsch* has been on the books for several years, and Petitioner points to not a single case striking down a Holocaust tax relief or education statute on the basis of field preemption. And for good reason. Such statutes do not impinge upon the field at issue here—the National Government's power to make and resolve war. *Cf. Garamendi*, 539 U.S. at 421 ("[v]indicating victims injured by acts ... in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding"). Rather, they represent an exercise of the state's taxing and spending powers. Because these are core state government functions, they would be subject to conflict preemption under *Garamendi*'s proposed approach to foreign affairs preemption. 539 U.S. at 419 n.11; *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (reviewing state law restricting purchase of goods and services for conflict with federal policy).

Statutes that generally toll limitations periods during wartime (Pet. 22-23) are similarly unaffected by the Opinion below, for they do not purport to provide remedies for specific war-related injuries. In marked contrast to Section 354.3, these statutes specify no particular war, class of victim, or type of injury, and thus express no policy with respect to how any given war claims ought to be resolved. *Cf.* Pet. App. 24a. And because such provisions operate only *prospectively*, extending the limitations period on *existing* claims, they are more clearly "procedural" in nature. *Deutsch*, 324 F.3d at 708. Section 354.3 is fundamentally different in this respect, as it *retroactively* strips defendants of limitations defenses. *Id.* at 707-08.

IV. The Opinion Below Presents No Occasion to "Reexamine" Foreign Affairs Preemption

Petitioner's final argument is that "it is time for the Court to recognize the confusion that *Zschernig* has caused" and to "reexamine" foreign affairs preemption. Pet. 29, 26; *see also* Cal. Br. 5-9. But this Court has already suggested a clarifying and limited approach to that doctrine in *Garamendi*. Because the Opinion below considered and applied *Garamendi*'s field preemption framework, it hardly works "an expansion" of the doctrine. Pet. 10. Indeed, the result reached by the Court of Appeals is consistent with the even narrower theory of field preemption suggested in the *Garamendi* dissent.

Even if foreign affairs field preemption required clarification, a grant of certiorari would not advance that goal. The Court could equally invalidate Section 354.3, as applied here, on conflict preemption grounds.

A. The Opinion Follows *Garamendi's* Cautious Approach to Field Preemption, and its Holding is Firmly Grounded in Precedent

1. Petitioner is wrong in suggesting that the Opinion "has taken foreign affairs field preemption farther than *Zschernig* and its progeny." Pet. 27.

Zschernig expressly invoked the negative implications of the federal government's foreign affairs power in holding the challenged statute preempted. "[E]ven in the absence of a treaty," the Court reasoned, "a State's policy may disturb foreign relations." 389 U.S. at 441. Because the government had taken the position that the statute "did not

unduly interfere with the United States' conduct of foreign relations," conflict preemption did not apply. *Id.* at 434 (citations omitted).

The Court's decision in *Garamendi* did not, as Petitioner suggests (Pet. 10), cast doubt on the "continued vitality" of *Zschernig*'s field preemption approach. The *Garamendi* Court merely clarified when field and conflict preemption properly apply, suggesting that field preemption is limited to situations where the state had "no serious claim to be addressing a traditional state responsibility." 539 U.S. at 419. As illustrated by the Court's analysis of HVIRA, this narrow approach to field preemption would still invalidate laws that, like Section 354.3, aggrandize a state's role in foreign affairs. *Id.* at 425-27.

The Opinion accords fully with these principles. Finding no conflict with federal policy, the Court of Appeals examined whether field preemption properly applied under *Garamendi*. The Court concluded that Section 354.3 did not address an area of traditional state authority (Pet. App. 21a-25a), and therefore was "subject to a field preemption analysis" (*id.* at 25a). Thus, even assuming that *Garamendi* set "a limit on the broad dormant foreign affairs doctrine" (Pet. 29), the holding below falls well within that limitation. And while Petitioner attempts to dismiss *Garamendi*'s approach as "dictum" (Pet. 14, 16), the Court of Appeals correctly recognized that its rejection of conflict preemption required it to consider the scope of field preemption in this case.

Petitioner's attempt to paint the Opinion as an outlier (Pet. 28) and field preemption as "moribund" (*id.* at 10), also runs headlong into the Ninth Circuit's decision in *Deutsch*. As noted, that decision

invalidated a virtually identical statute seeking "to redress wrongs committed in the course of the Second World War." 324 F.3d at 712. In striking down that provision, the Ninth Circuit expressly invoked *Zschernig* and "dormant foreign affairs preemption." *Id.* at 709 n.6.

2. Citing the dissent in *Garamendi*, Petitioner contends that "*Zschernig* and the notion of 'dormant foreign affairs preemption' may survive only when the state acts to criticize a foreign government." Pet. 29. She then attempts to harmonize this interpretation with the results in other cases, reasoning that the statutes deemed preempted in *Zschernig* and *Deutsch* were "aimed directly at a foreign country" and its foreign policy. *Id.* at 27.

Even under the *Garamendi* dissent's narrow interpretation of *Zschernig*, the degree of California's intrusion into the field of war resolution would make this a strong case for field preemption. In her dissent, Justice Ginsburg concluded that *Zschernig*'s field preemption analysis "resonates most audibly when a state action 'reflect[s] a state policy critical of foreign governments.'" 539 U.S. at 439 (citation omitted). The HVIRA, Justice Ginsburg reasoned, took "no position on any contemporary foreign government and requires no assessment of any existing foreign regime." *Id.* at 440.

Section 354.3, however, is much closer than HVIRA to the statute invalidated in *Zschernig*, for it too "intrude[s] extraordinarily deeply into foreign affairs." 539 U.S. at 440 (Ginsburg, J., dissenting) (citation omitted). The concern with criticism of foreign governments is rooted in its "potential for disruption or embarrassment" in federal foreign relations. *Zschernig*, 389 U.S. at 435. In concluding

that HVIRA did not pose this risk, Justice Ginsburg stressed that the statute "is directed solely at private insurers doing business in California," that it "mandates only information disclosure," and that it did not "authorize litigation." 539 U.S. at 435. Not so with Section 354.3. By each measure, California has taken a more aggressive tack here, creating a new claim, reviving liabilities, and allowing any plaintiff (not just the State) to sue any defendant whose contacts satisfy due process (not just those "doing business" in California).

The "potential for disruption" created by this statute is palpable, even assuming it stops short of creating an actual conflict with federal policy. *Cf. Zschernig*, 539 U.S. at 440. The breadth of the minimum contacts test means California could readily obtain jurisdiction over many museums abroad, a point the Legislature well understood. Pet. 16-18. Because European governments "often have full responsibility for the majority of museums" (ER 13), Section 354.3 lawsuits pose a real threat of hailing European governments into California courts.

As this case illustrates (Pet. App. 28a), the statute also invites lawsuits challenging post-war restitutions, which carry two distinct implications for United States foreign policy. First, Petitioner's collateral attack on Allied restitution proceedings would contravene the United States' external restitution policy. *Post* at 29-31. Second, such collateral attacks threaten to complicate the government's relationship with those Allied governments. Indeed, in her briefs below and before the Dutch courts, Petitioner specifically charged the Dutch government with violating international law. Appellees' CA9 Opening Br. 9-10; SER 152.

These risks inhere in Section 354.3, which is all that matters for field preemption. That Petitioner's claims might independently create diplomatic tension or invoke other bars (*e.g.*, act of state principles) does not blunt the statute's intrusion into foreign affairs.

B. Even if the Court Were Disposed to Choose Between Field and Conflict Preemption, this Case Would Be a Poor Vehicle for Doing So

Even if the Court were inclined to reconsider the relationship between field and conflict preemption, this case would be the wrong vehicle. Here, as in *Garamendi*, that question "requires no answer," 539 U.S. at 419, because this Court could affirm on the basis of the conflict between Section 354.3 and the federal government's policy on recovered artworks. By awaiting a case that raises the scope of field preemption more cleanly, this Court would benefit from further development in the lower courts.

1. This case presents no need or occasion to consider a "broad foreign affairs field preemption" (Pet. 10) because Petitioner's Section 354.3 action conflicts directly with the United States' external restitution policy.

a. There is no serious dispute that the paintings at issue were subject to an express federal policy. The parties agree that at the end of World War II, the United States adopted a policy of external restitution for recovered artworks. Pet. App. 5a-6a; Pet. 5; CA9 Reply Br. 13-14. The parties also agree that the government in fact carried out this policy with respect to the Cranachs by returning them to The Netherlands. Pet. App. 28a; Pet. 5; Compl. ¶ 22. The Goudstikker family then initiated restitution

proceedings in The Netherlands. Pet. 5; SER 146-47. They recovered substantial property, but chose not to seek return of the Cranachs. *Ibid.*

Were it to reach the issue, the Court could hold that Petitioner's Section 354.3 action conflicts with external restitution. The policy provided that the United States would return recovered artworks to the countries of origin "to handle restitution in whatever way they see fit." Pet. App. 17a (citation omitted). The United States was to play no further role once it transferred the artworks. *Ibid.* By allowing Petitioner to collaterally attack the Dutch government's restitution proceedings decades after the fact, Section 354.3 would nullify this policy. As applied here, the statute would substitute American litigation for Dutch restitution proceedings, which is just the sort of American involvement external restitution sought to avoid; its core principle was that "no attempt should be made to make restitution available to the original owners individually." Plunder & Restitution SR-140(citation omitted).

The Court of Appeals acknowledged the existence and scope of federal external restitution policy. Pet. App. 18a-19a. And it recognized that Section 354.3 was, in substance, at odds with that policy. *Ibid.* The only reason the Court declined to find a conflict was because it believed the policy "was no longer in effect." *Id.* at 19a. That observation is a non-sequitur; what matters is that external restitution legally and factually controlled the events material to the dispute here.

The United States carried out external restitution *with respect to the Cranachs*. That policy, and the Dutch restitution proceedings that followed, are also at the root of the title dispute, as Petitioner appears

to concede. Pet. 30. The Museum traces its title to the Dutch government's transfer to Stroganoff; Petitioner has challenged that transfer, arguing that the Cranachs should have been returned to the Goudstikker family as part of the 1950s restitution. Compl. ¶ 30; SER 152. The federal government's decision to end restitution under the policy in 1948, after the Cranachs had already been returned, hardly opened the door to alternative state remedies. The government decided that countries-of-origin had had enough time to submit claims. The application of that time bar ended the United States' involvement in the restitution of recovered art. To treat the termination as inviting future involvement by individual states would undermine the government's chosen remedy for recovered art, and defeat its related time restrictions.

b. Despite quoting at length from policy statements, Petitioner offers no support for her claim that the United States has backed away from external restitution, much less that it has endorsed private actions, in American courts, to challenge the Allied restitutions. Pet. 23-26. There is none.

First, none of the policy statements cited by Petitioner addresses the subject of this lawsuit: artworks subject to external restitution. The Terezin Declaration and the Washington Declaration nowhere mention external restitution. Nor do they consider the effect of past restitution proceedings on contemporary ownership claims. The text of these declarations shows, instead, that they are focused on more general problems of finding Nazi-looted (not restituted) artworks, and providing mechanisms for resolving claims to them. Indeed, the Washington Principles make clear that they address "art that had been confiscated by the Nazis and *not* subsequently

restituted." These policies simply have nothing to say about the Cranachs, and the federal policies governing their return to The Netherlands.

Second, the Terezin Declaration and Washington Principles—both non-binding—do not support Petitioner's claim that the United States has a policy of having restitution disputes "resolved in court." Pet. 23. To the contrary, both declarations stress alternative dispute resolution, and not litigation, as the preferred means of resolving disputes. *Cf. Garamendi*, 539 U.S. at 421 (federal preference for voluntary insurance settlements over litigation). The Washington Principles encouraged nations to develop "alternative dispute resolution mechanisms for resolving ownership issues." In the same Prague Conference remarks cited by Petitioner, Ambassador Eizenstat exhorted conference participants to support the Washington Principles' "emphasis on alternative dispute resolution," noting that "too many [art claims] result in litigation."

Nothing in the Terezin Declaration suggests the federal government "left to the states" the task of "enacting legislation" to facilitate the litigation of Holocaust claims. Pet. 25. The Declaration takes no policy position on the remedies available in the United States, much less on the proper allocation of state and federal responsibility. It merely establishes general goals for participating nations, urging them to "facilitate just and fair solutions" and dispositions "based on the facts and merits of the claims." This pronouncement cannot be taken to bless state war-remedy provisions like 354.3, especially given the government's positions on the foreign affairs doctrine. The United States has endorsed foreign affairs field preemption. *See* Brief for the United States, as Amicus Curiae Supporting Petitioner, *American Ins.*

Ass'n v. Garamendi, 539 U.S. 396 (No. 02-722), at 11 ("Th[e] [Constitution's] provisions serve to set matters of foreign commerce, foreign relations, and war in a field apart. It is a field that the States may not enter."). And it has opposed California's incursion into this field. *Id.* at 7 n.3 (arguing that HVIRA was preempted and noting that "California has enacted other laws" remedying World War II-related harms, citing, *inter alia*, Section 354.3).

Third, Ambassador Eizenstat's remarks about statute of limitations defenses (Pet. 24) have no bearing on artworks subject to external restitution. This is not a situation "where the claimant has not been provided with provenance information," encountered "difficulty in getting documentation," or was "unaware or only partially aware of [her] heritage." Pet. 24 (citation omitted). The Cranachs were identified, recovered, and externally restituted by the United States. Petitioner's complaint shows that since the 1940s, her family has possessed an inventory of Goudstikker works and known the recovered works were returned to The Netherlands. In any event, under the dissent Petitioner herself invokes, remarks by non-cabinet officers would be inadequate to override the formal external restitution policy. *Garamendi*, 539 U.S. at 442 (Ginsburg, J.).

2. Regardless of whether this case fairly presents the Petition's third issue, it would be premature to revisit *Garamendi*'s suggested approach to foreign affairs preemption now. *Garamendi* is of recent vintage, and only a few federal and state opinions have applied the decision. Rather than intervening at this nascent stage, the Court should allow the Courts of Appeals to continue applying and refining *Garamendi*'s principles.

C. No Limiting Construction Can Salvage Section 354.3, Which Is Invalid on Its Face

Petitioner's final gambit is to complain that the Ninth Circuit invalidated Section 354.3 on its face and declined to adopt her preferred construction limiting Section 354.3 to museums in California. Pet. 31-32. Again, she asks this Court to review a lower court's construction of state law. And again, she is wrong on the merits.

Even assuming that Section 354.3 would have been valid if confined to California museums, a limiting construction is permissible only if the statute is "readily susceptible" to it. *United States v. Stevens*, 130 S. Ct. 1577, 1581 (2010). Because the California Legislature considered and rejected a version of Section 354.3 limited to California (*ante* at 3), the Ninth Circuit properly declined Petitioner's invitation to "rewrite [the] law," *Stevens*, 130 S. Ct. at 1581.

The Ninth Circuit also correctly invalidated § 354.3 on its face. When a state acts with "verboten intent" (Pet. App. 27a), and steps into a field where it may not tread, it is self-evident that "no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Chamber of Commerce of U.S. v. Lockyer*, 422 F.3d 973, 992 (9th Cir. 2005). Petitioner's attempt to imagine a hypothetical statute, in which California did not act with this impermissible intent, is irrelevant. *Cf. Garamendi*, 539 U.S. at 426 (emphasizing "the state interest *actually* underlying HVIRA") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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